

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 JESUS DIAZ,  
12 CDCR #G-12594,

13 Plaintiff,

14  
15 vs.  
16

17  
18 JOHN DOE, Correctional Officer;  
19 SILVA, Correctional Officer; RAMOS,  
20 Sergeant Correctional Officer;  
21 J. MERCHANT, Correctional Officer,  
22

23 Defendants.

Civil No. 11-0553 JLS (WMc)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE, GARNISHING \$350.00  
BALANCE FROM PRISONER'S  
TRUST ACCOUNT [ECF No. 2];**

**(2) DENYING REQUEST FOR  
APPOINTMENT OF COUNSEL  
PURSUANT TO 28 U.S.C. § 1915(e)(1);  
and**

**AND**

**(3) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE OF COMPLAINT  
PURSUANT TO FED.R.Civ.P. 4(c)(3)  
& 28 U.S.C. § 1915(d)**

23 Jesus Diaz ("Plaintiff"), a state prisoner currently incarcerated at the Richard J. Donovan  
24 Correctional Facility, and proceeding in pro se, has filed a civil rights Complaint pursuant to 42  
25 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP")  
26 [ECF No. 2], as well as a Request for Appointment of Counsel (Compl. at 5-12.)

27 ///

28 ///

I.

MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

The Court denies Plaintiff’s request without prejudice, as neither the interests of justice nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

II.

MOTION TO PROCEED IFP [ECF No. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

The Court finds that Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [ECF No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,

1 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk  
2 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

### 3 **III.**

#### 4 **SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

5 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
6 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
7 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
8 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
9 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
10 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,  
11 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
12 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A.

13 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua  
14 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).<sup>1</sup> Accordingly, the Court  
15 finds Plaintiff is entitled to U.S. Marshal service on his behalf. See 28 U.S.C. § 1915(d) (“The  
16 officers of the court shall issue and serve all process, and perform all duties in [IFP] cases.”);  
17 FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal  
18 or deputy marshal ... if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C.  
19 § 1915.”).

### 20 **IV.**

#### 21 **CONCLUSION AND ORDER**

22 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

23 1. Plaintiff’s Request for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1)  
24 is **DENIED**.

25 ///

26 ///

---

27  
28 <sup>1</sup> Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is  
**GRANTED.**

3. The Secretary of California Department of Corrections and Rehabilitation, or his  
designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee  
owed in this case by collecting monthly payments from the account in an amount equal to twenty  
percent (20%) of the preceding month's income and forward payments to the Clerk of the Court  
each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).  
ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
ASSIGNED TO THIS ACTION.

4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,  
Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
Sacramento, California 95814.

**IT IS FURTHER ORDERED** that:

5. The Clerk shall issue a summons as to Plaintiff's Complaint [ECF No. 1] upon  
Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each  
Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and  
a certified copy of his Complaint and the summons so that he may serve Defendants. Upon  
receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and  
accurately as possible, and to return them to the United States Marshal according to the  
instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,  
the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed  
by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.  
*See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

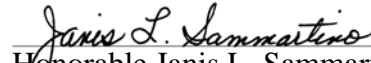
6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by  
counsel, upon Defendants' counsel, a copy of every further pleading or other document  
submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
of any document was served on Defendants, or counsel for Defendants, and the date of service.

1 Any paper received by the Court which has not been filed with the Clerk or which fails to  
2 include a Certificate of Service will be disregarded.

3 7. Plaintiff is not to be limited in the amount of photocopies “necessary to advance  
4 litigation.” *See* 15 Cal. Code Regs. § 3162(c).

5 **IT IS SO ORDERED.**

6 DATED: June 24, 2011

7   
8 Honorable Janis L. Sammartino  
United States District Judge